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IN THE

Supreme Court of the United States

October Term, 1963
No. 659

METROMEDIA, INC. (substituted for the name of METROPOLITAN BROADCASTING CORPORATION), a Delaware corporation, and PACIFIC OUTDOOR ADVERTISING COMPANY, a California corporation,

Appellants,

vs.

CITY OF PASADENA, a California municipal corporation, DON C. McMILLAN, as City Manager of said city, ROBERT McCUE, as Superintendent of Building of said city, BYRON B. GENTRY, as City Prosecutor of said city, and PAUL SHAFFER, as Planning Director of said city, and DOES ONE through ONE HUNDRED,

Appellees.

On Appeal From the California District Court of Appeal for the Second Appellate District.

APPELLEES' MOTION TO DISMISS.

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City Attorney,

FRED R. METHENY,
Assistant City Attorney,

EVELYN M. FINN,
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Appellees.

On Appeal From the California District Court of Appeal for the Second Appellate District.

APPELLEES' MOTION TO DISMISS.

Appellees respectfully request and move the dismissal of this appeal.

The sole basis for this motion is that the matter does not present a substantial federal question. Although, certainly, freedom of speech and due process are closely guarded by the Constitution of the United States, these personal guarantees are not here invaded by what is a valid and necessary exercise of the police power.

Ordinances Involved.

Section 3.09(A) (3) of Pasadena's Ordinance No. 4322 authorizes outdoor advertising in Zones C-3, C-M and M by ground signs only (effective June 19, 1959). This does not reduce the zones where such advertising was previously permitted.

Section 4.01(G) of Ordinance No. 4322 (effective June 19, 1959) required the removal of roof signs by July 1, 1961.

Section 3.08(A) (4) authorizes signs which (a) name the building whereon the sign is located, (b) contain the name of an occupier *and* his business, or (c) includes advertising which is strictly incidental and subordinate to a lawful use of the premises.

Section 16 of Ordinance No. 4487 permits roof signs which are made integral parts of buildings when they bear the name of the building whereon the sign is located or bear the name of an occupier *and* his business.

Section 27 of Ordinance No. 4487, in effect, exempts existing signs of the type permitted in Section 16 of that ordinance.

The full text of both the Zoning Ordinance (4322) and the Sign Ordinance (4487) are parts of the record of this appeal, and the pertinent ordinance amendments are set forth in full in Appendix C of Appellants' Jurisdictional Statement.

Questions Presented.

(1) Is freedom of speech abridged by restricting outdoor advertising activities to ground level signs; and, if so, can it be an issue?

(2) Can Pasadena permit the owner and occupier signs authorized by Section 16 of Ordinance No. 4487 and restrict commercial outdoor advertising activities from roof tops?

Statement of the Case.

The City of Pasadena was enjoined in the trial court from requiring the removal of appellants' 33 roof signs in the zones where their ground signs are still authorized. The judgment prohibited the enforcement of the Zoning Ordinance solely because of improper classification since owner and occupier roof signs are still permitted if made an integral part of the building [Clk. Tr. p. 36, lines 5-13].

The California District Court of Appeal, Second Appellate District, reversed the judgment and refused a rehearing. The California Supreme Court denied a hearing. Thus this appeal was necessarily limited to the constitutional question of equal protection or opportunity under the law (Opinion of the District Court of Appeal, Appellants' Jurisdictional Statement, Appendix A, p. 3).

Appellants' roof signs in Pasadena, however, constitute only a minute part of their outdoor advertising empire [Rep. Tr. p. 89, lines 7-12, p. 95, line 5]. The zoning regulation in question, because of its limited scope, can hardly annihilate appellants' overall commercial activities.

Although foreclosed from raising the point in the District Court of Appeal, appellants now contend that they have not had their day in court on the question of an unconstitutional taking of non-conforming use rights. Still there has been no taking of any sign, for they may

be at least partially reused. There has been no loss of use established for any individual signs. The specific monetary loss caused by the removal of each sign has not been clearly fixed. And finally, no real property right is taken since the signs are personal property located on leased roof tops. Appellants' right simply involves the opportunity to have signs seen by the public on public streets.

The appellees' stance in this case is as follows:

First, protection of the people's welfare supports the exercise of the police power now being considered. This power to regulate springs from the need to protect individuals from the clash of competing and incompatible uses. The burden of proof was on the appellants to establish that a profusity of roof signs did not exist or that they were not detrimental to the general welfare. No testimony was adduced to establish that the sign saturation was not inimical. At best, all that was concluded was that a sign problem exists in Pasadena and that reasonable minds could differ as to whose signs are most offensive (Opinion of the District Court of Appeal, Appendix A, Jurisdictional Statement, pp. 10-12).

Next, Pasadena contends that where outdoor advertising can be conducted is a matter for legislative determination. Hence, again the burden is on those attacking the legislation to establish the unreasonableness of the regulation as it applies to each prohibited sign. This has not been done.

Third, it can be agreed that a deep rooted philosophical problem exists in balancing the operating rights of an industry against the human rights of individuals living and working in the community. If the police power cannot be expanded to dignify environment, as well as to preserve property values, then the worth of the individual can only be equated in terms of his value as a means to the profit making ends of commercial enterprises. Consuming may be one important function of man. It is disconsoling to be told, however, that man's ultimate worth is to provide a potential appetite for advertising stimulation.

Fourth, the infrequent projection of political and public service messages cannot camouflage the profit motive. What is really involved here is the location of the message—not the message itself. Therefore, no abridgment of the freedom of speech is involved.

Finally, appellants' business activities are not being prohibited—only regulated. The outdoor advertising industry's cries of wolf have long been heard against municipal regulations. Still the industry continues to flourish. If competitive principles of free enterprise prohibit the appellants from competing for available ground space, the legislative power of the City of Pasadena is not the destroyer. If outdoor advertising is the most effective media for the communication of information, the law of the market place will prevail and outdoor advertising will continue to thrive.

THE FOLLOWING QUESTIONS ARE NOT SUBSTANTIAL.

I.

Reasonable Zoning Regulations Do Not Violate the Free Speech and Press Guarantees of the First and Fourteenth Amendments.

First, do the regulations in question entirely prohibit commercial outdoor advertising in the City of Pasadena? No—outdoor advertising may be conducted within the same zones where previously permitted. This regulation simply required the removal of roof signs over approximately a 2-year period. Ground signs may remain, and additional ground signs may be added. Thus the right to express a point of view by an advertiser continues to exist since no element of censorship is involved and because ground signs are still available.

The right to speak out, however, is not the right being claimed by these appellants. They are space salesmen selling a view—not a point of view. They have never been denied the personal right, as individuals, to express themselves either politically or commercially. The gravamen of their cause of action is business regulation. There is no standing to sue on the issue of the individual's right to free expression.

A case in close proximity to the point is *Valentine v. Chrestensen*, 316 U. S. 52, 62 S. Ct. 301, 86 L. Ed. 486. It involved the distribution of commercial handbills advertising a retired Navy submarine and soliciting visitors for a stated admission fee to which was added a public protest against the New York City Dock Department. Pure advertising could not be freely dis-

tributed. Public protest could be. The opinion stated the following on pages 54 and 55:

> "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct."

The court went on to hold in effect, that where the primary purpose is commercial, the denial of the use of a public street does not abridge free speech.

A distinction has long been drawn between commercial advertising and protest or opinion literature

(see *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 31 S. Ct. 709, 55 L. Ed. 815; *Packer Corp. v. Utah*, 285 U. S. 105, 52 S. Ct. 273, 76 L. Ed. 643, 79 A. L. R. 546; *Lewis Pub. Co. v. Morgan*, 229 U. S. 288, 313-316, 33 S. Ct. 867, 57 L. Ed. 1190, 1202, 1203; *Van Doorn v. United States*, 12 Ct. Cust. App. 167; *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 32 S. Ct. 387, 59 L. Ed. 552, Ann. Cas. 1916C 296).

The unrestricted distribution of commercial advertisements is not essential to maintaining the freedom of the press (see *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; *Schneider v. Irvington*, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155).

Then, obviously the naked intent of these appellants to make a profit through billboard advertising is not concealed under the occasional covers of public service or public protest.

Although outcries for the freedom, dignity and equality of man must be heard, the why, how, where and when of expressions has always been subject to reasonable limitations. Free expression is not an absolute right.

In *Kovacs v. Cooper*, 336 U. S. 77, 85-88, 69 S. Ct. 448, 93 L. Ed. 513, 10 A. L. R. 2d 608, the Court had this to say about it:

> "Of course, even the fundamental rights of the Bill of Rights are not absolute. The Saia Case recognized that in this field by stating 'The hours and place of public discussion can be controlled.'

It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, Schenck v. United States, 249 U. S. 47, 52, 63 L. Ed. 470, 473, 39 S. Ct. 247 that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a threatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.'

* * * * *

"While this Court, in enforcing the broad protection the Constitution gives to the dissemination of ideas, has invalidated an ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive the distributor's writings, this was on the ground that the home owner could protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.' The Court never intimated that the visitor could insert a foot in the door and insist on a hearing. *Martin v. Struthers,* 319 U. S. 141, 143, 148, 87 L. Ed. 1313, 1316, 1319, 63 S. Ct. 862, 882. We do not think that the Struthers Case requires us to expand this interdiction of legislation to include ordinances against obtaining an audience for the broadcaster's ideas by way of sound trucks with loud and raucous noises on city streets. The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality."

Thus in the light of the authorities just cited, the salient facts are brought out into sharp focus:

1. Appellants' operation is predominantly commercial, and the public is a captive audience.

2. There is no censor or prohibition of any message.

3. There is no basis to support an abridgment of free speech.

4. Appellants' business can be reasonably regulated in the manner here being considered.

II.

The Ordinances Are Valid in That They Constitute a Proper Exercise of the Police Power Rather Then the Taking of Property.

The District Court of Appeal determined this case on the basis that there was no question involving Pasadena's power to regulate in the manner exercised (Opinion of District Court of Appeal, Appendix A, Appellants' Jurisdictional Statement, p. 4 and footnote pp. 13-15).

Appellants now question the power. The rules for determining whether an exercise of the police power is proper or an unconstitutional taking of property are carefully considered in *Goldblatt v. Town of Hempstead, New York* (1962), 369 U. S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130, which is also cited by appellants in their jurisdictional statement.

The major premise of the *Goldblatt* case is that an exercise of the police power requires first, a public interest which needs protecting; and second, the means

must be reasonably necessary for the accomplishment of the purpose and not unduly oppressive (pp. 594-595).

Considering the first criteria—that a public interest must be involved—the basis for zoning, the need for this technique and the inclusion of billboard advertising within its reach has been firmly established in *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 380; 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016.

Next, whether the regulation is reasonably necessary is a matter for the legislature (*Goldblatt, supra* at p. 595). In the case at bar, even the testimony of appellants' witness established the fact that reasonable minds could differ (opinion of District Court of Appeal, Appellants Jurisdictional Statement, Appendix A, pp. 10-12).

The other rules for determining the constitutionality are also set forth in *Goldblatt, supra* at page 596:

> ". . . Our past cases leave no doubt that appellants had the burden on 'reasonableness.' *E.g.*, Bibb v. Navajo Freight Lines, 359 U. S. 520, 529, 79 S. Ct. 962, 967, 3 L.Ed. 2d 1003 (1959) (exercise of police power is presumed to be constitutionally valid); Salsburg v. Maryland, 346 U. S. 545, 553, 74 S. Ct. 280, 284, 98 L. Ed. 281 (1954) (the presumption of reasonableness is with the State); United States v. Carolene Products Co., 304 U. S. 144, 154, 58 S. Ct. 778, 784, 82 L. Ed. 1234 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it). . . ."

Finally, although the legislation in question merely regulates and does not prohibit, Goldbatt has this to say about prohibition at pages 592 and 593:

> "[1-3] Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. Walls v. Midland Carbon Co., 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920); Hadacheck v. Sebastian, 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915); Reinman v. Little Rock, 237 U. S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915); Mugler v. Kansas, 123 U. S. 623, 88 S. Ct. 273, 31 L. Ed. 205 (1887); see Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 S. Ct. 301, 54 L. Ed. 515 (1910). . . ."

Though Goldblatt is cited by the appellants, its reasoning and application can be marshalled against their position. The burden of proof cannot be reversed to require the defendant city to establish the constitutionality of its regulation. The presumption of constitutionality cannot be inverted into a presumption of unconstitutionality. An assumption of sinister intent on the part of the City Board of Directors cannot be adduced from any element of testimony or other evidence in the record.

III.

The Regulations Are Neither Discriminatory nor Arbitrary.

Railway Express Agency v. New York, 336 U. S. 106, 69 S. Ct. 808, 93 L. Ed. 1100, involved a city regulation which prohibited advertising vehicles in city streets but permitted the putting of owner business notices on commercial vehicles so long as such vehicles were engaged in the usual business of the owner. Thus it hits head on the appellants' contention that a sign is a sign. Here the only difference is that the signs are located on roof tops rather than on vehicles.

In clarifying the issues Mr. Justice Douglas stated on page 109 of 336 U. S.:

> ". . . We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. See Olsen v. Nebraska, 313 U. S. 236, 85 L. Ed. 1305, 61 S. Ct. 862, 133 A. L. R. 1500. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

Thus, the taking of property was not even deemed an issue. On the question of equal protection the opinion had this to say on pages 109 and 110:

> "The question of equal protection of the laws is pressed more strenuously on us. It is pointed out

that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.

"That, however, is a superficial way of analyzing the problem, even if we assumed that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants."

The *Railway Express Agency* case turned on the question of traffic hazard which is also a valid basis for the legislation in question. The same reasoning

applies, nevertheless, with equal logic to the question of sign blight.

Also appellants interpret Pasadena's regulations different than the City Attorney. In answer to appellants' arguments on page 22 of their jurisdiction statement, an outdoor advertising roof sign would not be legal if it advertised Coca Cola regardless of whether Coca-Cola or Pepsi-Cola were sold in the building for two reasons. First, the sign would have to be an integral part of the building which would make it something different from appellants' roof signs. Second, it must state both the name of the occupier *and* his business (Sec. 16 of Pasadena Ordinance No. 4487) and be strictly incidental and subordinate to a lawful use of the premises. (Sec. 308(A)(4)(c).)

Appellants could erect and maintain an "integral" sign, however, on a building where they took orders or fabricated signs because such a sign would be accessory. It would also be a locater and direction indicator.

As far as differences between the various advertising media are concerned, *Packer Corp. v. Utah*, 285 U. S. 105, 52 S. Ct. 273, 76 L. Ed. 643 is in point. There the regulation prohibited the sign advertisement of tobacco products but specifically authorized such advertisement by other advertising methods. In considering the classification question the court stated on pp. 110 and 111:

> "Moreover, as the State court has shown, there is a difference which justifies the classification be-

tween display advertising and that in periodicals or newspapers: 'Billboards, street car signs, and placards and such are in a class by themselves. They are wholly intrastate, and the restrictions apply without discrimination to all in the same class. Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have those of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines.' ..... Utah, ..., 297 Pac. 1013, 1019. The legislature may recognize degrees of evil and adapt its legislation accordingly. *Miller v. Wilson,* 236 U. S. 373, 384, 59 L. Ed. 628, 632, L. R. A. 1915F., 829, 35 S. Ct. 342; *Truax v. Raich,* 239 U. S. 33, 43, 60 L. Ed. 131, 136, L. R. A. 1916D, 575, 36 S. Ct. 7., Ann. Cas. 1917B, 283."

Thus, the distinctions between outdoor advertising and other commercial and advertising activities are easily recognizable. The prominent locations of billboards,

their clustering in key locations, the more vivid and ever changing messages, the absence of the locator and accessory use function—all of these factors fit billboards into a class by themselves.

Conclusion.

Appellants attack the validity of the zoning regulation in question behind the shields of free speech, due process and equal protection. The regulation, however, strikes no blow against the commercial activity of outdoor advertising as such. It is still a permitted use in the identical zones where previously allowed. Pasadena has stilled no utterance and threaten none because censorship is no aspect of the regulation. There has been no taking of property since the sign frames may be relocated and reused. In the final analysis this case turns on the loss of an opportunity to have an existing sign at a particular location viewed by captive spectators on the public streets and sidewalks. Is this the taking of a property right for which just compensation must be paid? Is any period of amortization necessary when no use of realty is being lost so far as these appellants are concerned? The answers are obviously no.

On the other side of the scales is the obligation of the City of Pasadena to foster traffic safety, to preserve the balance of land uses for the protection of its people, for the preservation of property values, and perhaps, most important to maintain a dignity of sur-

roundings in a time when the dignity of a people may be a most important asset in their struggle for survival.

Predicated on the foregoing reasons, no need exists to review the final action of the courts of California deciding what is purely a local matter.

Respectfully submitted,

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